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FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 11-07

**DNB EXPORTS LLC AND
AFI ELEKTROMEKANIK VE ELEKTRONIK SAN. TIC. LTD. STI.**

v.

**BARSAN GLOBAL LOJISTIKS VE GUMRUK MUSAVIRLIGI A.S.,
BARSAN INTERNATIONAL, INC., AND IMPEXIA INC.**

MEMORANDUM AND ORDER ON MOTIONS TO DISMISS

On April 14, 2011, complainants DNB Exports LLC (DNB) and AFI Elektromekanik Ve Elektronik San. Tic. Ltd. Sti. (AFI) (jointly Complainants) commenced this proceeding by filing a Verified Complaint with the Secretary of the Commission alleging that Barsan Global Lojistik Ve Gumruk Musavirligi A.S. (BGL), Barsan International, Inc. (Barsan Int'l), and Impexia Inc. (Impexia) (jointly Respondents) violated section 10(b)(13) of the Shipping Act of 1984. 46 C.F.R. § 41103(a). On May 23, 2011, BGL and Barsan Int'l filed a joint Answer denying liability and included a counterclaim alleging that DNB and AFI breached a contract with Barsan Int'l by failing to pay \$16,723.34 in charges for transportation allegedly provided by Barsan Int'l. (BGL/Barsan Int'l Answer at 6-8.) On June 13, 2011, Complainants filed a motion to dismiss the counterclaim. On July 7, 2011, BGL and Barsan Int'l notified the undersigned by letter that they do not plan to file a response to the motion. On June 6, 2011, in lieu of an answer, Impexia filed a motion to dismiss the Complaint against it for lack of personal jurisdiction. On June 21, 2011, Complainants filed a reply to Impexia's motion. This memorandum and order addresses the two motions to dismiss.

I. THE COMPLAINT.

Complainants allege that AFI is a corporation organized and existing pursuant to the laws of Turkey and DNB is a corporation organized and existing pursuant to the laws of the State of Delaware. AFI is a "wholesale distributor of U.S. standard electrical goods to construction firms

in the Greater Middle East.” (Complaint ¶ 1.) DNB acts as AFI’s procurement agent in the United States.

Complainants allege that respondent BGL is a corporation organized and existing pursuant to the laws of Turkey; Barsan Int’l is BGL’s subsidiary and a corporation organized and existing pursuant to the laws of the State of New York; and Impexia is a corporation existing pursuant to the laws of the State of New Jersey. Barsan Int’l is licensed by the Commission as a non-vessel-operating common carrier (NVOCC) and as an ocean freight forwarder with FMC License No. 004656NF and FMC Org. No. 015759. Complainants allege that Impexia acts as a trading company exporting electrical goods to Turkey. (*Id.* ¶ 14.)

Complainants allege that Barsan Int’l is a “mere sham, agent, or adjunct of BGL, that its separate existence as a distinct corporate entity should be ignored, and the two corporations should be regarded as a single corporate unit.” (Complaint ¶ 9.) Impexia, in turn, is alleged to be

a mere corporate shell of BGL and Barsan Int’l for the purpose of obtaining and utilizing BGL’s and/or Barsan Int’l’s customers commercial proprietary information, which is routinely obtained for performing Barsan Int’l’s NVOCC/freight forwarding/NVOCC [*sic*] services, with the purpose of engaging in the same business as Barsan [Int’l’s] customers and to solicit import/export trading business from their customers’ clients.

(*Id.* ¶ 10.)

Complainants allege a number of facts that they contend establish the relationship between Impexia and that support a finding that Impexia is a “mere corporate shell” of BGL/Barsan Int’l:

- Complaint ¶ 6 – When it began operations, Impexia used the same business address as Barsan Int’l;
- Complaint ¶ 19 – Impexia stopped using the same business address as Barsan Int’l when Respondents became aware that Complainants believed BGL/Barsan Int’l was giving Complainants’ proprietary information to Impexia;
- Complaint ¶ 17 – Mr. Jimmy Cuneyt Karadagli, who holds out as the owner of Impexia, is the husband of Ms. Burcin Karadagli, Barsan Int’l’s Accounting Manager, located at the same business address;
- Complaint ¶ 22 – Barsan Int’l’s officers (President Ugur Aksu, Vice President Sevgi Cebe, and Export Manager Tugsan Uresin) are listed as “friends” on Mr. Cuneyt Karadagli’s Facebook page, proving that they and Barsan Int’l maintain a close relationship with Impexia.

According to Complainants, pursuant to a Contract Carrier Agreement (Agreement) executed on January 15, 2009, between January 2009 and January 2011, Barsan Int'l provided NVOCC services to Complainants for shipments originating in United States ports for delivery in Turkey and other points. DNB provided Barsan Int'l export documentation, shipment information, shipper and consignee information, commercial invoices, and other information required to perform those services. The Agreement required the parties to keep this type of information confidential. Furthermore, section 10(b)(13)¹ of the Act provides:

A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information – (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or (2) may improperly disclose its business transaction to a competitor.

46 U.S.C. § 41103(a).

Complainants allege that Respondents violated section 10(b)(13) of the Act:

by knowingly disclosing, offering, soliciting and receiving information concerning the nature, kind, quantity, destination, shipper, consignee, and routing of property tendered or delivered to Barsan Int'l by DNB and/or AFI, by, without the consent of DNB and/or AFI, using that information to the detriment and disadvantage of DNB and/or AFI, by unlawfully disclosing that information to [Impexia] as a competitor [of DNB and AFI]

(Complaint at 10-11).

In paragraphs 24 through 34 of the Complaint, Complainants set forth a number of allegations that they contend demonstrate that Respondents violated section 10(b)(13). Briefly summarized, Complainants allege that in the course of their performance of NVOCC services to Complainants, BGL and Barsan Int'l learned information concerning the nature, kind, quantity,

¹ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Section 10(b)(13) is now codified at 46 U.S.C. § 41103(a). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., Worldwide Logistics Co., Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 11-04 (Mar. 30, 2011) (Order of Investigation and Hearing). I follow that practice in this memorandum.

destination, shipper, consignee, and routing of the property tendered or delivered to Barsan Int'l by DNB and AFI. In violation of the Shipping Act (and the Agreement), BGL and Barsan Int'l provided this information to Impexia. Armed with this information, Impexia was able to solicit business from Complainants' customers and to underbid Complainants on specific solicitations. When Respondents learned that Complainants suspected that Respondents were engaged in this alleged scheme, Impexia changed its business address and took other corrective action. (See Complaint at 6-10.)

In their Verified Answer, BGL and Barsan Int'l deny the material allegations in these paragraphs.

II. MOTIONS TO DISMISS.

The Commission's Rules of Practice and Procedure (Rules) do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim. The Rules do provide that "[i]n proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. Civil Rule 12(b)(1) permits a pleader to raise by motion lack of jurisdiction over the subject matter and Rule 12(b)(6) permits a pleader to raise by motion failure to state a claim. Fed. R. Civ. P. 12(b)(1) and (6). I find that it is consistent with sound administrative practice to follow Rules 12(b)(1) and (6).

The standards for motions to dismiss are well established.

A motion to dismiss under Rule 12(b)(1) may assert either a factual attack or a facial attack to jurisdiction. See [*McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007)]; *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence*, 919 F.2d at 1529. In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged by in the complaint as true. *McElmurray*, 501 F.3d at 1251 (noting in a Rule 12(b)(1) facial challenge a plaintiff has "safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised").

Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's

inference.” *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, “unwarranted deductions of fact” in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff’s allegations. *Id.*; *see also Iqbal*, 129 S. Ct. at 1951 (stating conclusory allegations are “not entitled to be assumed true”).

Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260-1261 (11th Cir. 2009). “The party asserting federal subject matter jurisdiction bears the burden of proving its existence.” *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010), *citing Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

A. BGL and Barsan Int’l’s Counterclaim and Complainant’s Motion to Dismiss the Counterclaim.

On May 23, 2011, BGL and Barsan Int’l filed a joint Answer denying liability and asserting several affirmative defenses. They also included the following counterclaim.

4. Barsan [Int’l] has provided transportation services for DNB and AFI.
5. DNB and AFI have failed to pay for such transportation services despite demand having been made.
6. DNB and AFI owe Barsan [Int’l] \$16,723.34, plus interest, for such transportation services.

* * *

8. DNB and AFI are in breach of contract based upon their failure to pay Barsan [Int’l] for transportation services provided.

WHEREFORE, Barsan [Int’l] respectfully requests the following relief:

- a. the entry of a judgment in favor of Barsan [Int’l] in the amount of \$16,722.36 plus interest, against for [*sic*] DNG and AFI for breach of contract.

(BGL/Barsan Int’l Answer at 7-8.)

Complainants filed a motion to dismiss the counterclaim. Complainants do not challenge the facts alleged in the counterclaim, but argue that the Commission does not have subject matter jurisdiction over a breach of contract claim. BGL/Barsan Int’l did not file a response to the motion to dismiss the counterclaim.

Section 11(a) of the Shipping Act provides that “[a] person may file with the Federal Maritime Commission a sworn complaint alleging a violation of [the Act].” 46 U.S.C. § 41301(a). Commission Rules provide: “In addition to filing an answer to a complaint, respondent may file a counter-complaint alleging violations of the Shipping Acts within the jurisdiction of the Commission.” 46 C.F.R. § 502.64(d).

[A]llegations essentially comprising contract law claims should be dismissed unless the party alleging the violations successfully rebuts the presumption that the claim is no more than a simple breach of contract claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support a claim, that the matter is appropriately before the agency.

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., 30 S.R.R. 991, 998 (FMC 2006) (citing *Cargo One, Inc. v. COSCO Container Lines Co.*, 28 S.R.R. 1635, 1645 (FMC 2000)).

The BGL/Barsan Int’l counterclaim alleges that they “provided transportation services for DNB and AFI;” that “DNB and AFI have failed to pay for such transportation services despite demand having been made;” and that “DNB and AFI owe Barsan [Int’l] \$16,723.34, plus interest, for such transportation services.” I accept these allegations as true for the purposes of this motion. BGL/Barsan Int’l contend that Complainants “are in breach of contract” and seek relief “for breach of contract.”

BGL/Barsan Int’l do not allege a violation of the Shipping Act and have not attempted to “rebut[] the presumption that the claim is no more than a simple breach of contract claim” over which the Commission does not have subject matter jurisdiction. Therefore, the counterclaim must be dismissed for lack of subject matter jurisdiction.

BGL and Barsan ask that the counterclaim be dismissed “with prejudice.” (BGL/Barsan Motion to Dismiss at 1.)

“The basic rule that dismissal for lack of subject matter jurisdiction does not preclude a second action on the same claim is well settled.” 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4436 (1981) (citing *Hughes v. U.S.*, 4 Wall. (71 U.S.) 232, 237, 18 L. Ed. 303 (1866), and other cases).

Holloway v. Brush, 220 F.3d 767, 778 (6th Cir. 2000). Therefore, the counterclaim must be dismissed without prejudice.

B. Impexia's Motion to Dismiss the Complaint.

1. Impexia's motion and Complainants' opposition to the motion.

In lieu of an answer, on June 6, 2011, Impexia filed a motion to dismiss the Complaint against it for lack of personal jurisdiction. Impexia contends that:

Impexia is not a regulated person or entity under the Shipping Act (*i.e.*, it is not an ocean freight forwarder, [NVOCC], ocean common carrier, marine terminal operator), did not engage in conduct or behavior regulated by the Shipping Act or the FMC; and has not held itself out in any manner or capacity that would result in Commission oversight.

(Impexia Motion to Dismiss at 3.) Impexia argues that Complainants' allegations that Impexia is a "mere corporate shell" and an "alter ego" of BGL/Barsan Int'l are not supported by the evidence and that Complainants have not made a *prima facie* showing that the Commission has personal jurisdiction over Impexia. Impexia attached a thirty-eight paragraph declaration signed by its president and twenty-two other exhibits to support its argument.

Complainants filed an opposition to Impexia's motion to dismiss. Complainants contend that the factual allegations in its Complaint must be taken as true on a motion to dismiss. The Complaint alleges that Impexia is a "mere corporate shell" of BGL and Barsan Int'l that used proprietary information Complainants provide to Barsan Int'l in connection with shipments to solicit business from Complainants' customers.

2. Discussion.

A court considering a motion to dismiss for lack of personal jurisdiction has the option of holding in abeyance a decision on the motion or even ordering a hearing with oral testimony. Deferring a decision will enable the parties to engage in discovery on jurisdictional issues. 5B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Civil 3d* § 1351 (2004). Delay may be particularly appropriate when the issue of jurisdiction is interwoven with the merits of the case. 5C C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Civil 3d* § 1373 (2004) (discussing former Fed. R. Civ. P. 12(d), current Fed. R. Civ. P. 12(i)).

The evidence on which Complainants rely for their claim that Impexia is "a mere corporate shell of BGL and Barsan Int'l" is not compelling. This issue is interwoven with the merits of Complainants' claim, however. Therefore, I will defer ruling on the issue of jurisdiction over Impexia pending a fuller record. The parties should not construe this deferral as limiting discovery from Impexia to the issue of personal jurisdiction.

Impexia is ordered to file its answer to the Complaint on or before July 18, 2011. 46 C.F.R. § 502.64(a).

IV. DISCOVERY AND LITIGATION SCHEDULE.

The parties have not yet submitted the proposed discovery schedule required by Rule 201. See *DNB Exports LLC v. Barsan Global Lojistik Ve Gumruk Musavirligi A.S.*, FMC No. 11-07 (ALJ May 3, 2011) (Amended Initial Order). Rule 201 requires that discovery be completed within 120 days of the Commission's service of the Complaint. 46 C.F.R. § 502.201(c). The Commission served the Complaint on April 27, 2011. *DNB Exports LLC v. Barsan Global Lojistik Ve Gumruk Musavirligi A.S.*, FMC No. 11-07 (FMC Apr. 27, 2011) (Notice of Filing of Complaint and Assignment). Pursuant to Rule 201(c), discovery should end by August 25, 2011.

In consideration of the delay caused by the motions to dismiss, it is *sua sponte* ordered that the parties file the discovery schedule required by Rule 201 on or before July 25, 2011. The parties are ordered to submit a proposed schedule that will provide for discovery to be completed by October 21, 2011. The parties should also submit a proposed scheduling order that will provide for completion of this proceeding within one year of the Commission's Notice of Assignment; that is, April 26, 2012.

ORDER

Upon consideration of the Motion to Dismiss Barsan Global Lojistik Ve Gumruk Musavirligi A.S. and Barsan International, Inc.'s Counterclaim, Barsan Global Lojistik Ve Gumruk Musavirligi A.S. and Barsan International, Inc.'s response thereto, the record herein, and for the reasons stated above, it is hereby

ORDERED that the Motion to Dismiss Barsan Global Lojistik Ve Gumruk Musavirligi A.S. and Barsan International, Inc.'s Counterclaim be **GRANTED**. Barsan Global Lojistik Ve Gumruk Musavirligi A.S. and Barsan International, Inc.'s Counterclaim is **DISMISSED WITHOUT PREJUDICE**.

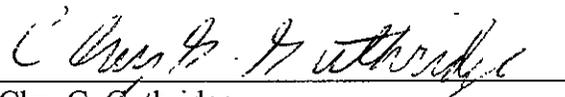
Upon consideration of Respondent Impexia Inc.'s Motion to Dismiss Complaint for Lack of Jurisdiction, the opposition thereto, the record herein, and for the reasons stated above, it is hereby

ORDERED that Respondent Impexia Inc.'s Motion to Dismiss Complaint for Lack of Jurisdiction be **DEFERRED**. Impexia may renew its motion at an appropriate time. It is

FURTHER ORDERED that Impexia Inc. serve and file its answer on or before July 18, 2011. 46 C.F.R. § 502.64(a).

It is hereby

ORDERED that on or before July 25, 2011, the parties file the discovery schedule required by Rule 201. The parties are ordered to submit as proposed schedule that will provide for discovery to be completed by October 21, 2011.



Clay G. Guthridge
Administrative Law Judge